IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

CRL.A.No. 2432 of 2006()

AGAINST THE JUDGEMENT/ORDER IN CRLP.475/2006 Dated 20/09/2006
CC.1/2005 of JUDL.MAGISTRATE OF FIRST CLASS, MAVELIKKARA

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PETITIONER/COMPLAINANT;

SIJU SAMUEL, NEDIYATHARA SIJU COTTAGE,
NEDIYAR, MAVELIKKARA.

BY ADV. SRI.K.S.HARIHARAPUTHRAN

VS.

RESPONDENTS/ACCUSED & STATE:

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1. K.UNNIKRISHNAN, HARI BHAVAN, ERUVA EAST,
KAYAMKULAM.

2. STATE OF KERALA REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR P. RAVEENDRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/05/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J

CRL.A.No. 2432 of 2006

Dated this the 25th day of May, 2007

ORDER

This appeal is filed against the order passed in C.C. No.1/2005 on the file of the Judicial First Class Magistrate Court, Mavelikara. The appellant/complainant filed a complaint against the 1st respondent/accused alleging that he had committed an offence punishable under section 138 of the Negotiable Instruments Act, 1881 as a cheque issued by the respondent in discharge of a debt in favour of the appellant/complainant was seen dishonoured on the ground of insufficiency of funds with the account holder. To prove the case, complaint filed with certain materials and on taking cognizance of the complainant, summons was issued to the 1st respondent and case was posted for evidence and further steps for several times and lastly on 22.7.2006. On 29.7.2006, by the impugned order, the trial court acquitted the 1st respondent/accused on the ground of absence of the appellant/complainant. The above order is now assailed in the appeal. This court heard the counsel appearing for the

appellant and have perused the records made available in this court . Though notice was served on the 1st respondent there is no appearance. The counsel for the appellant submits that the appellant was so diligent in prosecuting the case and he could not appear before the court on 29.7.2006 due to the mistaken noting of the posting date of the case by the Clerk of the counsel for the appellant and the absence was not due to any wilful latches or negligence. The counsel further submits that the order impugned is not in accordance with the principles laid down by this court in the judgments reported in 2005 (2) KLT 1003 (Don Bosco Vs. Partech Computers Ltd), 2006 (3) KLT 825 (GFS Chits and Loans (P) Ltd Vs. Rajesh) and also the judgment of the Apex Court reported in 1998(1) KLT 179 (SC) (Associated Cement Co. Ltd Vs. Keshavanand).

2. A perusal of the order impugned would show that the appellant was not so diligent in prosecuting case since it is seen that the appellant was found absent from court for several days. Hence the reason stated by the counsel appearing for the petitioner for the non-appearance of the petitioner on 29.7.2006 is not so convincing. However, after going through the order, this court is of the view that the trial Magistrate

though had stated that the case was posted with specific direction to the appellant to adduce evidence, it is not discernible from the order that the trial court was at such a stage that the court could not proceed with the case only due to the absence of the appellant. That reasoning is absent in the order. Hence, on the principles laid down by this court in Don Bosco Vs. Partech Computers Ltd (cited supra)and GFS Chits and Loans (P) Ltd case (cited supra) it is only proper for this court to set aside the order impugned and the matter be remanded back to the trial court for consideration. However, this can only be done on payment of some amount by the appellant , for his absence from the court, and hence this court direct the appellant to remit an amount of Rs.2,500/- (Rupees Two thousand five hundred only) to the High Court Legal Services Authority within fifteen days from the receipt of a copy of this judgment.

3. The trial court is directed to take the appeal afresh from the stage and proceed with the same just prior to the stage at which the order impugned has been passed. Apart from the reasons stated above, this court is inclined to accept the wider principles given by the Apex Court in Associated

Cement Co. Ltd Case, with regard to the power of the court envisaged under Section 256 of the Code. In the above judgment, the Apex Court held in paragraph 17 of judgment as follows:

> **"Reading the section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the Section. First is, if the court thinks that in a situation it is proper to adjourn the hearing then the magistrate shall not acquit the accused. Second is, when the magistrate considers that personal attendance of the complainant is not necessary on that day the magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."**

On considering all these aspects, this court allows the appeal by setting aside the order impugned and directing the court below to proceed with the matter as aforesaid on issuing fresh notice to the 1st respondent. The appellant shall

appear before the court on 28.7.2007. He shall produce the receipt of remittance before the court below on his appearance.

(K.THANKAPPAN,JUDGE.)

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/True copy/

P.A TO JUDGE